

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 18**

UNITED PARCEL SERVICE, INC.,

Respondent,

and

MARK DAVID HAM,

an Individual.

Case No. 18-CA-193426

**UNITED PARCEL SERVICE, INC.’S POST-HEARING BRIEF**

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COMES NOW United Parcel Service, Inc. (“Respondent” or “UPS”), by and through its attorneys, pursuant to Section 102.42 of the Board’s Rules and Regulations and Statements of Procedure, and submits its Post-Hearing Brief with the Administrative Law Judge (“ALJ”) in the above-captioned proceeding. UPS respectfully requests that the First Amended Complaint, and all allegations contained therein, be dismissed in its entirety.

## **I. INTRODUCTION**

This case arises under the terms of the Collective Bargaining Agreement entered into between UPS and Teamsters Local Union No. 238 (“the Union”), effective August 1, 2013, through July 31, 2018 (the “CBA”). (JT Ex. 1-2).<sup>1</sup> On Thursday, February 16, 2017, Mark Ham (“Charging Party” or “Ham”) was involved in an incident where he shouted, cursed, and acted threateningly toward his supervisors, John Henson (“Henson”) and Adam Miller. (TR. 60:8-13, 366:22-367:17, 491:21-493:10, JT Ex. 3-4). Ham was asked to calm down, but he refused to do so. (TR. 367:3-20, 368:23-369:12, 493:23-494:9, JT Ex. 3-4).

The next day during a grievance hearing where Ham was present as the Union steward, Randy Ervin (“Ervin”), the UPS Labor Manager, asked Ham to re-sign the UPS Professional Conduct and Anti-Harassment Policy. (TR. 377:13-20, 451:8-12, 534:5-15, JT Ex. 10). After initially refusing, Union business agents met with Ham privately, and thereafter he re-signed the policy. (TR. 72:12-73:1, 378:3-11, 572:17-25, JT Ex. 10). A few months later, Ham was discussing UPS’ break policy with Henson when he again exploded and cursed at Henson. (TR. 383:20-385:24, JT Ex. 11). In response, Henson and Ervin issued a warning letter to Ham about his behavior to ensure that Ham comply with the UPS Professional Conduct and Anti-

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<sup>1</sup> The designation “TR \_\_\_” shall refer to transcript page citations; the designation “JT Ex. \_\_\_” shall refer to joint exhibits offered by the Parties and received by the ALJ; the designation “UPS Ex. \_\_\_” shall refer to exhibits offered by UPS and received by the ALJ; and “NLRB Ex. \_\_\_” shall refer to exhibits offered by the NLRB and received by the ALJ.

Harassment Policy and CBA provision requiring supervisors and employees to treat each other with dignity and respect. (TR. 388:13-390:25, JT Ex. 11). In doing so, UPS took reasonable and proportional measures to maintain discipline in the workplace and protect its supervisors from repeated harassment.

## **II. PROCEDURAL HISTORY AND ACTING GENERAL COUNSEL'S ALLEGATIONS**

On February 21, 2017, Ham, a current UPS employee, filed an unfair labor practice charge alleging that UPS threatened him with unspecified reprisals for engaging in union activity. Ham later filed an amended charge on June 14, 2017 alleging that UPS disciplined or retaliated against Ham because he joined or supported a labor organization. After Region 18 concluded its investigation, the Regional Director issued a Complaint on August 15, 2017. The Acting General Counsel<sup>2</sup> later filed a First Amended Complaint on November 14, 2017, which alleged that UPS violated Section 8(a)(1) of National Labor Relations Act ("NLRA" or "Act") by taking the following actions:

5. About February 17, 2017, Respondent, by Labor Relations Manager Randy Ervin, at Respondent's facility, threatened an employee with unspecified reprisals if the employee continued to engage in Union activity and/or file charges with the National Labor Relations Board.

6. (a) On April 27, 2017, Charging Party Ham concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees, by raising concerns about a new break policy.

(b) On May 1, 2017, Respondent, by Business Manager John Henson, disciplined Charging Party Ham.

The General Counsel alleges that UPS took action with Ham because of Ham's concerted activities, and in doing so, UPS sought to discourage employees from engaging in concerted activities or exercise their rights under Section 7 of the Act.

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<sup>2</sup> For sake of brevity, Acting General Counsel will hereinafter simply be referred to as General Counsel.

On November 14, 2017, UPS answered the First Amended Complaint, denying the substantive allegations that it disciplined Ham because he engaged in concerted activities or otherwise sought to discourage employees from engaging in concerted activities. UPS further asserted that the First Amended Complaint's allegations should be deferred to the contractual grievance-arbitration process of UPS and the Union. On November 14, 2017, a hearing was held in this matter before ALJ Andrew Gollin.

### **III. STATEMENT OF THE FACTS**

#### **A. UPS Maintains Multiple Policies To Protect Employees From Abuse and Harassment, and UPS Enforces Those Policies Uniformly**

UPS has promulgated an interconnected network of policies designed to promote an open, informal, and collaborative work environment in which employees are protected from threatening and harassing behavior by employees and supervisors. These policies include:

1. **UPS Code of Business Conduct.** The Code of Business Conduct includes a policy that protects employees from harassment that interferes with an individual's work performance or creates an environment that is "intimidating, hostile, or offensive to the individual." (TR. 566:5-568:3; JT Ex. 8 at UPS-HAM 0085-0086).
2. **UPS Policy Book.** The Policy Book provides that UPS maintains a work environment free of any type of harassment. (JT Ex. 9 at UPS-HAM 0029).
3. **UPS Professional Conduct and Anti-Harassment Policy ("Anti-Harassment Policy").** The Anti-Harassment Policy provides that UPS takes steps to maintain a professional work environment and prohibits harassment of any kind by employees regardless of position. Prohibited harassment includes acting threateningly toward another individual and includes any behavior that has the purpose or effect of unreasonably interfering with an employee's work performance or creates "an environment that is intimidating, hostile, or offensive to the employee." (JT Ex. 7).

All of these documents are presented to UPS employees upon hire or otherwise available to UPS employees via the UPS website. (TR. 566:5-21). Collectively, these policies make clear that UPS will work to respond to complaints of harassment or threatening behavior and respond appropriately.



UPS' Iowa operations have consistently investigated reports of threatening or harassing behavior and enforced the Anti-Harassment Policy. (TR. 197:15-199:19, 309:25-312:23). The Union business agents for Iowa confirmed that UPS routinely disciplines or reviews the Anti-Harassment Policy with individuals when other employees raise concerns. (TR. 309:25-312:23, 447:15-448:14). Employees are not disciplined under the Anti-Harassment for merely cursing, and UPS only addresses their conduct where other employees complain about comments or actions being abusive, threatening, harassing, or offensive. (TR. 223:20-224:4, 440:9-24, 462:16-463:6, 503:4-7, 597:9-25, 602:5-25).

UPS has disciplined or requested other employees (including supervisors and managers) re-sign the Anti-Harassment Policy. (TR. 197:15-199:19, 309:25-312:23, 502:23-503:3, 543:15-544:10). For example, UPS terminated (later changed to resignation) another employee at the Coralville facility, Tim Pugh, for violations of the Anti-Harassment Policy. (TR. 502:1-22, 580:17-581:3). UPS required the entire preload staff at the Davenport facility (including supervisors) to re-sign the Anti-Harassment Policy due to issues with behavior there. (TR. 542:3-20, 576:15-577:22, UPS Ex. 2). Mike Arndt ("Arndt"), the Area Human Resources Manager for Iowa, also requested that Lyle Wicks and Jeff Bexell re-sign the Anti-Harassment Policy due to their posting inappropriate material, cursing, and threatening one another at the Des Moines facility. (TR. 574:14-576:12, UPS Ex. 3-4).

Arndt reviewed the Anti-Harassment Policy with a manager (Simon Nelson) due to his swearing, blowing up, and acting abusively toward employees. (TR. 576:15-578:22, UPS Ex. 5-6). Nelson was ultimately demoted due to his behavior. *Id.* Arndt also spoke with Todd Hartzell at the Des Moines facility due to Hartzell acting unprofessionally and abusively toward a manager. (TR. 590:14-596:10, UPS Ex. 10). Finally, UPS required another full time delivery

driver at the Coralville facility, Paul Yoerger, to re-sign the Anti-Harassment Policy due to berating employees, unprofessional behavior, and outbursts toward management employees. (TR. 581:4-587:16, 588:22-590:12, UPS Ex. 7-9).

**B. UPS Respects Employees' Rights Under the NLRA and Has a Healthy, Longstanding Relationship with the Union**

UPS' workplace culture also reflects its longstanding and congenial relationship with the various unions that represent its employees. (TR. 307:10-15, 443:9-16). The Policy Book expressly advises employees that "[w]e respect the right of our employees to be represented by labor unions, works councils, or other similar groups." (JT Ex. 9 at UPS-HAM 0031). UPS has an extensive CBA with the Teamsters that (including the Supplemental Agreement with the Teamsters Central Region) is approximately 250 pages long. (JT Ex. 1-2).

The CBA covers a diverse spectrum of workplace issues. The CBA incorporates the principles delineated in the Anti-Harassment Policy in Article 36 of the CBA National Master Agreement. Article 37 further provides that UPS "will treat employees with dignity and respect at all times,...[and] Employees will also treat each other as well as the Employer with dignity and respect."<sup>3</sup> (TR. 448:5-449:11, JT Ex. 1 at UPS-HAM 0244-245). It further assures employees that UPS will "not retaliate against employees for exercising rights under this Agreement." *Id.* Employees frequently file grievances under the CBA, and their uninhibited use of the grievance process shows that UPS not only permits employees to exercise their Section 7 rights, but *actively encourages* them to do so. (TR. 82:10-12, 146:13-16, 147:8-10, 370:14-19, 383:20-384:3). The Union business agents confirmed that UPS does not create any impediment to union members filing grievances at the Coralville facility and that UPS and the Union have a

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<sup>3</sup> As discussed in Section IV.C.2, *infra*, the Board has recently made clear that employers may enforce such standards of civility in the workplace.

good working relationship. (TR. 307:10-15, 309:1-6, 443:5-16, 447:11-14). They also confirmed that Henson, Ervin (the UPS Labor Manager for Iowa), and Mike Arndt have never exhibited any anti-union animus or impeded Union members' rights. (TR. 307:16-309:6, 444:15-445:2, 447:11-14). Dave Miller, a Union business agent, also testified that UPS and the Union expect each other to abide by Article 37 requiring UPS and the Union to treat each other with dignity and respect. (TR. 448:8-449:7).

**C. Mark Ham's Work History and February 2017 Explosion at Henson and Adam Miller**

Mark Ham began his employment with UPS in 1988 and works as a package car driver in UPS' Coralville facility. (TR. 33:21-34:11). Ham is also a Union steward, and he testified that his Union activity as a steward became more active over three years ago. (TR. 151:14-152:17). Ham has filed numerous grievances at the Coralville facility (including some that Union business agent Dave Miller viewed as "nonfactual" or "BS"). (TR. 461:25-462:9, 483:21-485:5).

On February 10, 2017, Adam Miller (a UPS on-road supervisor at the Coralville facility) performed a ride-along with another UPS package car driver, Dennis Peer ("Peer"). (TR. 52:11-18). Adam Miller observed numerous methods violations by Peer during the ride that he had attempted to address with Peer in the prior weeks. (TR. 55:15-56:2, 515:6-516:22). Because Peer had not corrected these methods violations during the ride-along, Adam Miller and Henson decided to issue a warning letter to Peer about the methods violations.<sup>4</sup> (TR. 516:7-15).

On February 16, 2017, after the morning meeting attended by all drivers, Henson and Adam Miller asked Peer and Ham to speak in the customer counter clerk's office. (TR. 57:15-59:1). The office is located behind the customer counter (where the clerk works with customers)

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<sup>4</sup> UPS utilizes extremely detailed methods that are important because they ensure driver safety/health and conserve time worked by focusing on planning ahead and making stops efficiently. (TR. 357:2-360:8).

and is a very small office with little room to move. (TR. 129:10-131:12). Ham, Peer, Henson, and Adam Miller entered the room and shut the door. (TR. 131:13-18, 491:9-19). During that meeting, Henson and Adam Miller addressed the methods violations observed during the ride with Peer.<sup>5</sup> (TR. 59:20-60:7, 491:9-19).

While reviewing the methods violations and warning letter with Peer, Ham exploded at Henson and Adam Miller by yelling and acting abusively toward them, screaming “You’ve got to be fucking kidding me, you guys can’t be fucking doing this [and] this is fucking bullshit.” (TR. 60:8-13, 366:22-367:17, 491:21-493:10, JT Ex. 3-4). Henson and Adam Miller were taken aback by Ham’s outburst, and immediately asked Ham to calm down.<sup>6</sup> (TR. 60:13-15, 283:18-22, 367:3-17, 492:13-493:16, JT Ex. 3-4). Despite the request to calm down, Ham refused to do so, shouting, “This is fucking bullshit, you’re fucking with a shop steward.” (TR. 367:3-20, 368:23-369:12, 493:23-494:9, JT Ex. 3-4). Ham also became physically agitated with his hands, turned bright red (with his veins bulging out of his neck), and appeared completely out of control despite requests to calm down. (TR. 368:4-17, 517:25-519:16). Ham had never yelled at his supervisors prior to this incident. (TR. 374:18-375:6).

Although the door was shut for this meeting, Ham later told Henson and Adam Miller that others could hear the meetings and therefore such meetings should be moved to the upstairs offices. (TR. 369:15-370:7, 503:18-505:3). Once Ham did calm down, he requested paperwork regarding the warning letter, and the meeting ended. (TR. 412:4-19, 493:21-495:1). Given how agitated Ham had acted during the meeting, Henson and Adam Miller prepared write-ups

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<sup>5</sup> It is undisputed that UPS believes addressing driver methods is important to improve driver performance, and UPS was within its rights under the CBA to address the methods violations by Peer and issue the warning letter. Mr. Peer’s grievance and NLRB unfair labor charge regarding the methods violations were dismissed. (TR. 118:24-119:20, 278:22-280:13).

<sup>6</sup> Notably, even Ham admits that he was asked to calm down. (TR. 138:2-7).

memorializing the incident, which they relayed to Randy Ervin. (TR. 372:19-374:4, 375:7-21, 495:2-496:7, 528:19-529:17, JT Ex. 3-4). Henson also related that he felt threatened by Ham's behavior and that the behavior made Henson nervous. (TR. 528:23-529:11).

Ervin had previously scheduled a local level grievance hearing to take place the next day on February 17 at the Coralville facility. (TR. 529:12-17, 569:23-570:20). Three business agents from the Union (Dave Miller, Gary Mika, and Rod Walton) and Henson, Ervin, and Arndt from UPS attended the local level grievance hearing that day. (TR. 66:11-67:15). Ham also attended as the Union steward for the grievances being heard that day. (TR. 67:19-22).

At the end of that meeting, Ervin told Ham that he wanted to discuss the prior day's events. (TR. 69:4-12, 377:7-20, 532:12-18). Ervin instructed Ham that he needed to act professionally and should not yell or threaten supervisors, and therefore Ervin had decided to review the Anti-Harassment Policy with Ham. (TR. 69:13-22, 371:13-21, 377:7-20, 378:12-18, 450:16-451:5, 456:1-8, 533:12-534:4, 571:10-572:7). Ham initially declined to re-sign the Anti-Harassment Policy. (TR. 377:13-20, 451:8-12, 534:5-15). Gary Mika requested a brief recess and the Union business agents spoke with Ham in the hallway. (TR. 72:12-73:1, 163:8-13, 378:3-11, 452:21-22, 456:9-12, 572:13-16). Upon returning to the room, Ham re-signed the Anti-Harassment Policy, and the meeting ended. (TR. 72:12-73:1, 378:3-11, 572:17-25, JT Ex. 10). Notably, both Dave Miller and Gary Mika testified that Ervin did not in any way threaten Ham when requesting that Ham re-sign the Anti-Harassment Policy. (TR. 321:21-24, 323:13-15, 457:1-3, 465:16-466:1).

Although Peer (himself a union steward) had also protested claims about methods violations in a meeting with Henson and Adam Miller on February 6, 2017 and again during the February 16, 2017 meeting (calling the violations "bullshit"), he did not yell at or act abusively

toward them at that time. (TR. 230:1-18, 233:16-234:24). Ervin did not request that Peer re-sign the Anti-Harassment Policy, and Peer did not otherwise receive any discipline for cursing in the presence of Henson and Adam Miller. (TR. 230:13-18, 233:16-234:24).

**D. Mark Ham Again Explodes at John Henson in April 2017, and UPS Issues Ham a Warning Letter**

A few months later on April 27, 2017, Ham inquired with Henson about an issue regarding drivers marking their break times. (TR. 379:17-23). The matter concerned whether drivers needed to record breaks for restroom stops where no package delivery was scheduled. (TR. 379:24-382:11). After asking Ervin about UPS policy on the matter, Henson related the restroom breaks policy to Ham at the end of the day. (TR. 382:8-383:7).

After Henson relayed the information, Ham again exploded at Henson, yelling “That’s not right you guys...” Henson immediately attempted to calm Ham down, telling Ham that he could file a grievance and get a ruling if he did not agree. (TR. 383:20-384:3). Ham continued yelling at Henson, however, stating “I’m tired of you guys treating us like shit.” (TR. 384:1-385:24, JT Ex. 11). As during the February 16 incident, Ham turned red, was gesticulating wildly with his arms, and appeared extremely agitated. (TR. 384:4-8, JT Ex. 11). Henson asked Ham to leave due to Ham being out of control and feeling cornered in the small space. (TR. 384:7-15, 386:1-24, JT Ex. 11).

Ham briefly left the office, but almost immediately turned around and complained about a scheduling issue. (TR. 386:25-387:14). Henson responded that any problems with scheduling were inadvertent, at which time Ham stared down Henson with an extremely angry expression of “pure madness and hate” and a physical pose leaning in toward Henson. (TR. 386:25-388:17, 427:11-429:4, JT Ex. 11). After Ham left, Henson contacted UPS security and also sought guidance from Ervin regarding the incident because of Ham’s threatening and unsettling

behavior. (TR. 388:23-389:24, JT Ex. 11). Henson and Ervin decided to issue Ham a warning letter due to his violation of the UPS Anti-Harassment Policy. (TR. 388:13-390:25, JT Ex. 11).

Henson and Adam Miller presented Ham with the warning letter on May 1, 2017 with Union steward Erik Emerson present. (TR. 391:16-392:5, JT Ex. 5). After Adam Miller informed Ham that he would be receiving a warning letter for violating the Anti-Harassment policy, Ham stated that he could do whatever he wanted to just short of threatening Henson's life. (TR. 392:6-23, 499:8-22, JT Ex. 5). Ham also laughed and smirked at Henson's statement that Ham's behavior was threatening and that it was affecting Henson's life outside of work. (TR. 392:6-23, JT Ex. 5, UPS Ex. 1). Adam Miller prepared a write-up documenting the meeting. (TR. 393:7-11, 500:10-23, JT Ex. 5). Ham did not file a grievance regarding the issuance of the warning letter. (TR. 190:10).<sup>7</sup> UPS did not ask Ham to re-sign any other policies or otherwise discipline Ham throughout 2017. (TR. 173:22-174:8).

#### **IV. ANALYSIS**

##### **A. UPS Did Not Attempt to Discourage Ham's Union Activity by Having Ham Re-Sign the Anti-Retaliation Policy or Issuing a Warning Letter**

##### **1. UPS Did Not, by Randy Ervin and as Alleged in Paragraph 5 of the First Amended Complaint, Threaten Ham with Unspecified Reprisals to Discourage Union Activity in Violation of Section 8(a)(1)**

UPS did not, through its manager, Randy Ervin, threaten Ham with unspecified reprisals to discourage his participation in Union activities. The competent record evidence demonstrates that pursuant to UPS policies and practices, Ervin requested that Ham re-sign the Anti-

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<sup>7</sup> All UPS representatives testified that Ham could have filed a grievance about the issuance of the warning letter and UPS would not object to hearing the warning letter in the grievance process. (TR. 557:12-558:14, 559:5-560:11). Although the Union business agents testified that warning letters are not typically grieved because they are automatically protested, they further noted that nothing in the CBA or Supplemental Agreement with the Teamsters Central Region precluded filing a grievance over the issuance of the warning letter. (TR. 324:20-326:9, 463:7-22). Ham also admitted he was not prohibited from filing a grievance over the warning letter. (TR. 151:5-13). Business agent Dave Miller admitted Ham could have filed a grievance over the warning letter. (TR. 463:7-22).

Retaliation Policy because of Ham's abusive language and threatening behavior toward Henson and Adam Miller.

With the exception of Ham's self-serving testimony, no other witness testified that Ervin made any type of threat of any reprisals against Ham when he asked Ham to review and re-sign the Anti-Harassment Policy. In fact, Dave Miller, Gary Mika, and UPS' witnesses contradicted Ham, testifying that Ervin simply asked Ham to comply with the Anti-Harassment Policy and did not threaten Ham with unspecified reprisals. (TR. 321:21-24, 323:13-15, 376:25-378:18, 457:1-3, 465:16-466:1, 571:10-572:25). There is no substantive evidence to support the allegation that Ervin threatened Ham due to his union activity. Ham's own exaggerated account of the February 17 meeting was discounted by his own witness, Gary Mika, who works as a Union business agent. (TR. 321:21-24, 323:13-15). Instead, the record is clear that Ervin merely reviewed the Anti-Harassment Policy with Ham due to Ham's behavior toward Henson and Adam Miller the prior day, and Ervin requested that Ham abide by the Anti-Harassment Policy going forward. As discussed below, there is also no evidence that requesting Ham re-sign the Anti-Harassment Policy was in any way caused by his Union activity.

**2. UPS Did Not, by John Henson and as Alleged in Paragraph 6(b) of the First Amended Complaint, Discipline Ham to Discourage Union Activity in Violation of Section 8(a)(1)**

The First Amended Complaint also alleges that UPS sought to discourage Ham's Union activity by issuing a warning letter to Ham on May 1, 2017 for violations of the UPS Anti-Harassment Policy. Although the testimony at the hearing established that Ham was discussing issues about the break policy with Henson, there is no evidence to suggest that UPS sought to discourage Ham's Union activities via the warning letter given to Ham on May 1. The record demonstrates that UPS did not discipline Ham "because of" his Union activity, and there is no evidence to suggest that UPS sought to discourage Ham's Union activity.



UPS does not discourage its employees from engaging in Union activity. Indeed, the testimony (including from Ham himself) established that Henson has frequently encouraged Ham to file a grievance regarding his complaints about UPS policies or practices. (TR. 82:10-12, 146:13-16, 147:8-10, 370:14-19, 383:20-384:3). UPS did not seek to discourage Ham's Union activity by issuing the warning letter on May 1, 2017. Henson's credible testimony established that Ham exploded a second time and acted abusively and threateningly toward a supervisor. (TR. 386:25-389:24, 427:11-429:4, JT Ex. 11). Ham received the proportional discipline of a warning letter due to his violation of the Anti-Harassment Policy, nothing more.

Although Ham claims that Henson had previously taken offense in February at Ham's statement that he would file a charge with the Board, the credible evidence and testimony in the record demonstrates that Henson simply expressed his belief that Ham should go through the normal grievance process, as he repeatedly encouraged Ham to file a grievance regarding various disputed issues. (TR. 82:10-12, 146:13-16, 147:8-10, 180:1-8, 370:8-19, 383:20-384:3). The Acting General Counsel did not present any cogent evidence (other than Ham's self-serving testimony) that UPS' issuance of the warning letter sought to discourage Ham's Union activity.

29 U.S.C. §§ 158(a)(1), (3) prohibit discharge or discipline of employees "because of union activity." *N.L.R.B. v. Trans. Mgmt. Corp.*, 462 U.S. 393, 394 (1983) *abrogated on other grounds in Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Collieries*, 512 U.S. 267, 277 (1994). The Supreme Court has further stated that when the Board "files a complaint alleging that an employee was discharged because of union activities, the employer may assert legitimate motives for [its] decision." *Id.* at 394-395.

To prove a *prima facie* case, the Board has held that the General Counsel must show "that the employee's conduct protected by § 7 was a substantial or a motivating factor in the

[discipline].” *Transp. Mgmt.*, 462 U.S. at 399-400 (approving of test articulated in *Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980)). The *Wright Line* test applies where the employee’s misconduct occurs after the employee engaged in protected activity. See *Phoenix Transit System*, 337 NLRB 510, 510 (2002).<sup>8</sup> Under the *Wright Line* test, the General Counsel’s burden is satisfied by demonstrating: (i) the employee’s engagement in the protected activity; (ii) the employer’s knowledge of that activity; (iii) the employer’s antipathy toward it; and (iv) a causal link between the antipathy and the adverse employment action. *Transp. Mgmt.*, 462 U.S. at 401-03. The employer may then rebut this *prima facie* showing, or it can seek to prove “by a preponderance of the evidence that the [discipline] rested on the employee’s unprotected conduct as well and that the employee would have [received discipline] in any event.” *Transp. Mgmt.*, 462 U.S. at 401.

Here, the competent evidence presented at the hearing demonstrates that UPS has no antipathy toward Ham’s Union activity, as it is undisputed that UPS has encouraged Ham to file Union grievances. The evidence also establishes UPS’ long and healthy relationship with the Union in Iowa. (TR. 307:10-15, 309:1-6, 443:5-16, 447:11-14). The Acting General Counsel therefore cannot satisfy the third prong of the *prima facie* case by showing any employer antipathy toward Ham’s Union activity.

There is also no proof of a causal link between any UPS antipathy toward protected activity and the disciplinary action. In considering whether any protected activities form a substantial and motivating factor in the decision to discipline an employee, the ALJ should consider the totality of the circumstances and record as a whole. *Vulcan Materials Co.*, 2004 NLRB LEXIS 272, at \*70, Case No. 14-CA-27555 (May 25, 2004). Probative circumstantial

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<sup>8</sup> Notably, Ham’s discipline for continued cursing at his supervisors continued after he was asked to calm down in his meetings but refused to do so. (TR. 367:3-20, 368:23-369:12, 493:23-494:9, JT Ex. 3-4).

evidence of motive is often found in disparate treatment of the alleged discriminatees to others, deviation from past practice, and timing. *Id.* None of these factors point to unlawful motivation in this case.

The testimony established that UPS issued the warning letter due to Ham's repeated explosions against Henson, where Ham acted abusively and threateningly toward his supervisor. (TR. 388:13-390:25, JT Ex. 11). Ham had filed numerous grievances at the Coralville facility, and Ham was encouraged to file grievances over any disputed matter. (TR. 82:10-12, 146:13-16, 147:8-10, 370:14-19, 383:20-384:3, 461:25-462:9, 483:21-485:5). Ham's Union activity had not significantly increased during the past year, as Ham testified that he became more active as a Union steward over three years ago. (TR. 151:14-152:17). Yet, UPS did not discipline Ham at any time for his Union activities or ardently arguing on behalf of other Union members. (TR. 173:22-174:8). To argue that UPS decided to discipline Ham "because of" any protected activity so many years after Ham had vigorously undertaken Union steward activities defies both the evidence presented at the hearing and common sense. Thus, the Acting General Counsel cannot show a *prima facie* case because there is insufficient proof of any causation.

Even if the Acting General Counsel has offered proof of a *prima facie* case, UPS has proven by a preponderance of the evidence that Ham's discipline was not related to any protected activity and was due to his violation of the Anti-Harassment Policy. As discussed above, UPS presented ample evidence that it enforces its Anti-Harassment Policy consistently where employees act in a threatening, offensive, or abusive manner toward other employees. (TR. 223:20-224:4, 440:9-24, 462:16-463:6, 503:4-7, 597:9-25, 602:5-25). UPS enforces the Anti-Harassment Policy against employees and supervisors alike. (TR. 576:15-578:22, UPS Ex. 3-10). The Acting General Counsel presented no evidence to suggest that UPS does not

otherwise enforce the Anti-Harassment Policy consistently. UPS also presented evidence demonstrating that Ham acted in an abusive manner by cursing and yelling at supervisors. (TR. 60:8-13, 366:22-367:17, 384:1-385:24, 491:21-493:10, JT Ex. 3-4, 11). Ham had not otherwise yelled or acted abusively toward other employees, and he was only disciplined in these instances due to his improper behavior and violation of UPS policies. (TR. 374:18-375:6). Thus, UPS has rebutted the Acting General Counsel's *prima facie* case and the First Amended Complaint should be dismissed.

**B. Even If the ALJ Believes UPS Threatened or Disciplined Ham Because of His Union Activities, Ham Lost the Protection of the Act**

Although there is no proof of any causation, the Acting General Counsel has argued that Ham's discipline should be analyzed under the *Atlantic Steel* framework. 245 NLRB 814 (1979). Under that framework, the ALJ examines whether the conduct is sufficiently egregious or opprobrious to remove it from the protection of the Act. *Noble Metal Processing, Inc.*, 346 NLRB 795 (2006). Although employees are permitted some leeway for impulsive behavior when engaged in protected activity, this leeway is balanced against "an employer's right to maintain order and respect." *Piper Realty*, 313 NLRB 1289, 1290 (1994). To determine whether an employee loses the Act's protection, the Board balances four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. *Atlantic Steel Co.*, 245 NLRB 814 (1979).

Although UPS does not believe that the *Atlantic Steel* framework is appropriate as the evidence shows UPS has no animus against Ham's Union activities, even if applied here Ham's behavior lost the protection of the Act. First, although Ham's yelling and cursing at Henson and Adam Miller occurred in a closed office, it was of such high volume (as demonstrated by Adam

Miller at the hearing) that other UPS employees overheard the exchange. (TR. 369:15-370:7, 491:9-493:5, 503:18-505:3). The subsequent explosion by Ham on April 27, 2017 occurred with Henson's office door open and Ham standing in the upstairs hallway area of the UPS Coralville facility. (TR. 384:7-387:14, JT Ex. 11). Where other employees can overhear an employee screaming profanities at supervisors, the employee loses the protection the Act. *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005). This factor is very significant in balancing the employee's right to engage in protected activity against the employer's right to maintain order and discipline. *Plaza Auto Center, Inc.*, 360 NLRB 972, 978 (2014).

Although the second factor (the subject matter of the discussion) favors protection, the third factor weighs strongly against protection for Ham for either incident. In assessing whether an employee's actions lose the Act's protection, the Board has found that a line "is drawn between cases where employees engaged in concerted activities that exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service." *Prescott Industrial Products Co.*, 205 NLRB 51, 51-52 (1973).

Where abusive and profane language is directed at supervisors and is not common or otherwise tolerated, the employee loses the protection of the Act. *DaimlerChrysler Corp.*, 344 NLRB at 1329 (upholding written warning where employee used profanity towards his supervisor in more than one outburst, calling him an "asshole," and saying "bullshit, I want the meeting now" in response to supervisor's denial of employee's request for an immediate grievance investigation. Although outburst was brief, employee lost protection when he uttered profanity more than once, and though profanity was common at the plant, there was no evidence

that profanity was commonly targeted at management). *See also Tampa Tribune*, 351 NLRB 1324, 1326 (1985) (referring to vice president as a “stupid fucking moron” weighs “only moderately” against protection in part because employee did not say it to his face); *Stanford Hotel*, 344 NLRB 558 (2005) (nature of outburst not protected when employee loudly called supervisor a liar and a “fucking son of a bitch”); *Atlantic Steel Co.*, 245 NLRB at 817 (Board deferred to the arbitrator’s finding that employee had lost protection of the Act when he “reacted in an obscene fashion without provocation and in a work setting where such conduct was not normally tolerated.”). Additionally, abusive language that is threatening or menacing also loses the Act’s protections. *Precision Window Mfg., Inc. v. N.L.R.B.*, 963 F.2d 1105, 1110 (8th Cir. 1992) (finding that employee forfeited the Act’s protection when he cursed at his supervisor, called his supervisor obscene names, and threatened to kill his supervisor as he was leaving the plant after his firing).

Here, Ham’s behavior on February 16, 2017 and April 27, 2017 lost the protection of the Act because he abusively cursed and yelled at Henson and Adam Miller in a manner completely uncalled for or warranted, refused to calm down and cease cursing at supervisors as requested, and acted menacingly toward Henson. This was more than a single, momentary outburst of profanity. The testimony established that during both incidents, Ham continued cursing and yelling despite being asked to calm down, but refused to do so. (TR. 367:3-20, 368:23-369:12, 493:23-494:9, JT Ex. 3-4). Even Ham admits he was asked to calm down, but continued to curse at his supervisors thereafter. (TR. 138:2-7). Where an employee continues to yell and use profanity beyond a momentary outburst, he loses protection of the Act. *See Harbor Rail Servs. Co. & Eric Schultz*, 2017 WL 1548283, Case No. 25-CA-174952 (Apr. 28, 2017).

Finally, the fourth factor also weighs against protection as Ham's outbursts were not in any way provoked by an unfair labor practice. Although Ham certainly took issue with Peer's methods violations and the UPS restroom breaks policy, Peer's grievance and unfair labor charge on the methods warning letter were dismissed and neither Ham nor Acting General Counsel offered any evidence to suggest that UPS' break policy was in any way an unfair labor practice. (TR. 118:24-119:20, 278:22-280:13). Because Ham's behavior was not provoked by any unfair labor practices of UPS, the fourth factor weighs against protection.

In sum, three of the four *Atlantic Steel* factors weigh strongly against finding that Ham retained the protection of the *Act*. Because Ham's abusive yelling and cursing at his supervisors was not protected, the First Amended Complaint should be dismissed.

**C. The *Atlantic Steel* Factors Do Not Relieve the Acting General Counsel from Being Required to Prove Causation Under Supreme Court and Board Precedent, and To the Extent They Do, the *Atlantic Steel* Framework Must Be Repudiated Under the Recent Board Decision in *The Boeing Company***

As noted above, there is no credible evidence that the request to re-sign the Anti-Harassment Policy or issuance of the warning letter to Ham was caused in any way by Ham's Union activities. As noted above, the Supreme Court has stated that any discipline must be "because of union activity." *Trans. Mgmt. Corp.*, 462 U.S. at 394. Although the *Atlantic Steel* factors focus primarily on the circumstances of an employee's outburst, this analysis should not relieve the Acting General Counsel from rebutting "the employer [] assert[ing] legitimate motives for [its] decision." *Id.* at 394-395.

"Where...the NLRB adopts an unreasonable position, it can find no solace in the fact that it made the same mistake in prior cases...merely applying an unreasonable statutory interpretation for several years [cannot] transform it into a reasonable interpretation." *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. N.L.R.B.*, 253 F.3d 19, 26 (D.C. Cir. 2001). To the

extent that the *Atlantic Steel* factors contradict Supreme Court precedent and ignore an employer's legitimate motives and justifications for discipline, the *Atlantic Steel* framework should be repudiated.

**1. The General Counsel Has Historically Needed To Prove Causation to Show an Unfair Labor Practice and Rebut the Employer's Legitimate Business Reasons for Discipline**

Although the *Atlantic Steel* framework often elides examination of causation for an employee's discipline, longstanding precedent establishes that proof of a legitimate business motive for discipline may rebut the contention that an employer has committed an unfair labor practice. *Trans. Mgmt. Corp.*, 462 U.S. at 394; *see also Greenwich Collieries*, 512 U.S. at 277 (noting that the holding of *Transportation Management* remains intact as "the NLRB first required the employee to persuade it that antiunion sentiment contributed to the employer's decision. Only then did the NLRB place the burden of persuasion on the employer as to its affirmative defense."); *Emerson Elec. Co. v. N.L.R.B.*, 573 F.2d 543, 548 (8th Cir. 1978) (finding that employer's reasons for discipline even in the context of employee's union activity were persuasive) (citing *H. L. Meyer Co. v. N.L.R.B.*, 426 F.2d 1090, 1094 (8th Cir. 1970) ("Where the reasons advanced for [discipline] are persuasive and serve as a plausible motive, **the mere existence of the employee's union activity cannot serve as the real motive behind the employer's action.**") (emphasis added)); *N.L.R.B. v. Cleveland Pressed Products Corp.*, 493 F.2d 1250 (6th Cir. 1974) ("Union activity by an employee does not insulate him from discharge where his conduct so warrants.").

**2. The Board Has Recently Recognized That UPS Has a Substantial Justification For Enforcing Its Anti-Harassment Policy to Protect Its Employees**

Employers have an obligation to provide for the safety of their employees, which includes protecting them from harassment, abuse, and a hostile work environment created by



other employees. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) recognized this obligation and created a defense for employers who implement anti-harassment policies reasonably designed to prevent unlawful harassment.

UPS has therefore implemented the Anti-Harassment Policy to address these obligations and avoid liability for failing to protect its employees. (TR. 565:14-566:4). UPS also utilizes other policies in this framework (including the CBA, Code of Conduct, and Policy Book) to establish that while employees will not be penalized for exercising rights protected by the Act, they are required to not harass or verbally abuse other employees. (TR. 448:5-449:11, 566:5-568:3, JT Ex. 1 at UPS-HAM 0244-245, JT Ex. 7, JT Ex. 8 at UPS-HAM 0085-0086, JT Ex. 9 at UPS-HAM 0029). In enforcing these policies, UPS seeks to implement progressive discipline under the policy so as to change employee behavior and avoid harassing or abusive behavior in the workplace. (TR. 543:15-544:10).

The Board recently recognized that legitimate justifications for facially neutral workplace rules may outweigh any impact on rights protected by the Act. *The Boeing Co. & Soc'y of Prof'l Eng'g Employees in Aerospace, Ifpte Local 2001*, 365 NLRB No. 154, 2017 WL 6403495 (Dec. 14, 2017). There, the Board overruled the prior *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) “reasonably construe” standard and provided guidance on policies requiring employees to abide by basic standards of civility:

To the extent the Board in past cases has held that it violates the Act to maintain rules requiring employees to foster ‘harmonious interactions and relationships’ or to maintain basic standards of civility in the workplace, those cases are hereby overruled....**[S]uch rules reflect common-sense standards of conduct that advance substantial employee and employer interests**, including the employer’s legal responsibility to maintain a work environment free of unlawful harassment based on sex, race or other protected characteristics, its substantial interest in preventing workplace violence, and its interest in avoiding unnecessary conflict that

interferes with...productivity and other legitimate business goals; and nearly every employee would desire and expect his or her employer to foster harmony and civility in the workplace.

*The Boeing Company*, 2017 WL 6403495, at \*4 n.15 (emphasis added).

The Board further noted that it would evaluate the facts of different cases to “strike the *proper balance* between...asserted business justifications and the invasion of employee rights in light of the Act and its policy.” *Id.* (citing *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967)) (additional citations omitted and emphasis in original). In *Great Dane*, the Supreme Court explained that if an action is deemed to have only a “comparatively slight” impact on employee rights, **an affirmative showing of improper motive must be made to sustain a violation**, if the employer has come forward with evidence of a legitimate and substantial business justification. 388 U.S. at 34.

In short, the Board has now made clear that UPS may enforce the Anti-Harassment Policy, even in the context of protected concerted activity. The Board’s decision also recognizes in referencing *Great Dane* that the Acting General Counsel must show that any discipline imposed under the Anti-Harassment Policy was motivated by the protected activity and not simply a result of an employer’s consistent and fair application of a facially neutral policy.

Under the new balancing test announced in *The Boeing Company*, there is no question that UPS’ Anti-Harassment Policy is lawful, as the Board stated that “such rules reflect common-sense standards of conduct that advance substantial employee and employer interests.” *The Boeing Company*, 2017 WL 6403495, at \*4 n.15. Because the Anti-Harassment Policy is a facially neutral policy, the Acting General Counsel must show that UPS’ application of the policy to Ham’s conduct was motivated by anti-union or other unlawful animus. As noted above, the Acting General Counsel has failed to show that the application of the Anti-Harassment Policy

to Ham's conduct was motivated by anything other than UPS' consistent enforcement of its rule prohibiting abusive conduct in the workplace.

**3. UPS Has a Legitimate Business Reason For Disciplining Ham That Outweighs Any Impact On Ham's Protected Activities**

Ham has been encouraged to exercise his rights under the Act. (TR. 82:10-12, 146:13-16, 147:8-10, 370:14-19, 383:20-384:3). However, Ham cannot act in such a way where he repeatedly berates, yells, and curses at his supervisors. The evidence established (without any rebuttal from Ham or the Acting General Counsel) that UPS consistently enforces its Anti-Harassment Policy against employees and supervisors. (TR. 576:15-578:22, UPS Ex. 3-10). Even Dave Miller, the Union business agent, supported UPS' contention that the company expects all employees to abide by the Anti-Harassment Policy. (TR. 448:8-449:7). Thus, there is no dispute that UPS has a legitimate business reason for enforcing the Anti-Harassment Policy and does so frequently, undermining any suggestion that Ham's discipline was motivated by an unlawful purpose.

The credible testimony from Henson, Adam Miller, and Ervin established that Ham yelled and berated his supervisors during the incidents. Ham's claim that he was speaking in a normal tone was not supported by the evidence, particularly as Henson and Adam Miller immediately prepared write-ups about Ham's explosions. (JT Ex. 3-4, 11). Although Dennis Peer testified that Ham did not yell (though his voice was louder than normal) at the February 16, 2017 incident, Ham himself admitted that he was asked to quiet down and not curse. (TR. 60:8-21, 138:8-140:6, 256:10-25). Ham's outbursts had occurred in other settings, such as when Gary Mika had to ask Ham to calm down during a grievance meeting. (457:18-458:10). In short, there is ample evidence in the record to support the conclusion that Ham yelled and cursed at Henson and Adam Miller on February 16, 2017 and April 27, 2017.

The hearing testimony established that Ham has engaged in Union activities before and after the incidents. (TR. 151:14-152:17, 461:25-462:9, 483:21-485:5). UPS has not taken any action to discourage Ham from doing so. (TR. 82:10-12, 146:13-16, 147:8-10, 370:14-19, 383:20-384:3). Given UPS' strong relations with the Union and the unfettered ability of Coralville employees to press their Section 7 rights, the impact of a warning letter (that will be rescinded nine months after issuance if there are no further incidents) on Ham's protected activities is minimal. (TR. 464:19-465:2). Thus, under the new *Boeing Company* guidance, the *Atlantic Steel* framework must take into account that the evidence established no unlawful motive in UPS' issuance of the warning letter and a minimal impact on Ham's Section 7 rights, and therefore the First Amended Complaint should be dismissed.

Because UPS policies lawfully prohibit abusive behavior toward other employees, UPS' legitimate business interests outweigh any impact on Ham's protected activities under the balancing test of *The Boeing Company*. To the extent the *Atlantic Steel* framework does not consider the employer's motives in administering discipline under a facially neutral policy that supports legitimate business interests, it cannot survive the guidance provided by the Board in *The Boeing Company*. Accordingly, to the extent it conflicts with *The Boeing Company* balancing test, the *Atlantic Steel* framework must be repudiated.

**D. In the Alternative, Pre-Arbitral Deferral of the First Amended Complaint Is Appropriate**

In the alternative, UPS' long-standing collective-bargaining relationship with the Union providing for employees' grievances about alleged violations of their rights and the CBA strongly favors deferring this matter to the grievance-arbitration process.

The Board has broad discretion to defer a case to a collective-bargaining arbitration process. *Collyer Insulated Wire*, 192 NLRB 837 (1971); and *United Technologies Corp.*, 268

NLRB 557 (1984). Deferral is appropriate when: “[1] the dispute arose within the confines of a long and productive collective-bargaining relationship; [2] there is no claim of employer animosity to the employees’ exercise of protected statutory rights; [3] the parties’ agreement provides for arbitration of a very broad range of disputes; [4] the arbitration clause clearly encompasses the dispute at issue; [5] the employer has asserted its willingness to utilize arbitration to resolve the dispute; and [6] the dispute is eminently well suited to such resolution.” *Wonder Bread, A Div. of Interstate Brands Corp. & Teamsters Local Union No. 334, Sales & Serv. Indus.*, 343 NLRB 55 (2004).

Applying the Board’s factors, deferral is appropriate in this case. Union business agents candidly admitted that UPS and the Union have a long and productive collective-bargaining relationship. (TR. 307:10-15, 443:5-16). Employees frequently file grievances pursuant to the CBA, and the evidence presented at the hearing demonstrates that UPS encourages employees to exercise their Section 7 rights by filing grievances about a host of issues. (TR. 82:10-12, 146:13-16, 147:8-10, 370:14-19, 383:20-384:3). The Union business agents admitted that UPS does not create any impediment to union members filing grievances at the Coralville facility. (TR. 309:1-6, 443:5-16). They also confirmed that Henson, Ervin, and Arndt have never exhibited any anti-union animus or impeded Union members’ rights. (TR. 307:16-309:6, 444:15-445:2, 447:11-14). Finally, Ham and the Union business agents admitted that Ham could have filed a grievance regarding the warning letter, and UPS representatives testified that Ham could have filed a grievance over the issuance of the warning letter and UPS would not object to hearing the warning letter in the grievance process. (TR. 324:20-326:9, 463:7-22, 557:12-558:14, 559:5-560:11). Ham also admitted he was not prohibited from filing a warning letter. (TR. 151:5-13). Business agent Dave Miller admitted Ham could have filed a grievance over the warning letter.

(TR. 463:7-22)

The CBA makes clear that UPS and the Union contemplated potential disputes over matters involving union activity and explicitly authorized using the grievance-arbitration procedure on those matters that could not be resolved. UPS and the Union have had a bargaining relationship dating back several decades and have consistently looked to arbitration as a means of resolving disputes. The parties have established a standard practice to which UPS has expressed its willingness to pursue in resolving the instant dispute. No evidence here “preclude[s] a finding that the grievance and arbitration machinery can reasonably be relied on to function properly and to resolve the current disputes fairly.” *See United Aircraft Corp.*, 204 NLRB 879 (1972). Thus, for the foregoing reasons, the First Amended Complaint should be deferred to the parties’ contractual grievance-arbitration procedure.

## **V. CONCLUSION**

Simply put, the Acting General Counsel has not shown that Mark Ham was disciplined in any way “because of” his union activity. UPS requested Ham re-sign the Anti-Harassment Policy and then issued him a warning letter due to his unprofessional and abusive conduct. The evidence presented at the hearing clearly demonstrates that Ham violated the Anti-Harassment Policy and refused to calm down when UPS supervisors requested that he do so. Under the circumstances, UPS respectfully submits the evidence at the hearing proves that Ham was properly disciplined for just cause and, therefore, the First Amended Complaint should be dismissed in its entirety.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on December 22, 2017 the foregoing was electronically filed with the National Labor Relations Board at <http://nlr.gov> served via the same upon:

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